

# CRIMINAL JURISDICTION OVER DEPENDENTS AND CIVILIAN EMPLOYEES OF THE ARMED FORCES OVERSEAS

The armed forces of the United States are stationed in 63 countries throughout the world. In addition to the military personnel at our overseas bases, there are generally two other classes of American citizens also present: (1) civilian employees of the armed forces and (2) dependents of servicemen and civilian employees. This paper deals with the scope of federal criminal jurisdiction over members of these latter two groups for crimes committed by them on foreign soil in times of peace.

Article 2 (11) of the Uniform Code of Military Justice purports to subject “. . . all persons serving with, *employed by*, or *accompanying* the armed forces without the continental limits of the United States . . .”<sup>1</sup> to the jurisdiction of military court martial. However, in a recent series of cases, the United States Supreme Court has held article 2(11) unconstitutional as applied to these two classes of civilians. The result is that at present no American court may try them for crimes committed overseas.

The purpose of this paper is twofold: (1) to consider the constitutional analysis used by the Court in reaching this conclusion; and (2) to explore the possible alternatives available to Congress to provide for the exercise of criminal jurisdiction over these persons.

## ANALYSIS OF THE CONSTITUTIONAL QUESTION

Ordinarily, when an American citizen commits a federal offense, he is tried by a civil tribunal deriving its power from article III of the Constitution.<sup>2</sup> By specific constitutional provision, he is entitled, *inter alia*, to a trial by jury after indictment by a grand jury.<sup>3</sup> Trial by court martial, on the other hand, is the exercise of an extraordinary jurisdiction arising from the power granted to Congress “To make Rules for the Government and Regulation of the land and naval Forces.”<sup>4</sup> The procedures prescribed by the Uniform Code of Military Justice for the conduct of a military court martial differ

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<sup>1</sup> 10 U.S.C. § 802 (11) (1950).

<sup>2</sup> U.S. Const. art. III, § 1.

<sup>3</sup> U.S. Const. art. III, § 2: “The trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . .” U.S. Const. amend. V: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . .” U.S. Const. amend. VI: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .”

<sup>4</sup> U.S. Const. art. I, § 8, cl. 14.

markedly from those of civil courts, perhaps the most significant difference being the absence of any requirement for a jury trial or for a grand jury indictment.<sup>5</sup>

The determination of the limits on Congress' power to subject civilian employees and dependents to the jurisdiction of the military courts overseas required the decision of two principal questions: (1) whether the Constitution protects an American citizen overseas; and (2) whether civilian employees and dependents are in close enough relation to the land and naval forces to be considered a part thereof.

### *The Reach of Constitutional Guarantees*

The members of the Court are in unanimous agreement that fundamental constitutional guarantees such as those provided by article III and the fifth and sixth amendments continue to protect American citizens against governmental action when they are outside the United States. This conclusion is based upon a literal interpretation of the language of these provisions. In the words of Mr. Justice Black, "The language of Art. III § 2 manifests that the constitutional protections for the individual were designed to restrict the United States government when it acts outside of this country, as well as here at home."<sup>6</sup> Even if it is only "fundamental" rights which follow a citizen overseas,<sup>7</sup> one could hardly imagine a more jealously guarded or more cherished right than the right to jury trial.<sup>8</sup> In arriving at this conclusion, the Court was forced to dispose of, as inapposite, the "consular"<sup>9</sup> and "insular"<sup>10</sup> cases which, on the first

<sup>5</sup> See 10 U.S.C. §§ 836-854 (1950) for trial procedure in the military courts.

<sup>6</sup> Reid v. Covert, 354 U.S. 1, 7 (1957).

<sup>7</sup> See Dorr v. United States, 195 U.S. 138, 144-149 (1904).

<sup>8</sup> United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 16, 18-19 (1955); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 122-123 (1866); 3 Blackstone's Commentaries 379 (1765).

<sup>9</sup> *In re Ross*, 140 U.S. 453 (1891), involved a seaman who had killed a ship's officer on an American ship in Japanese waters. He was seized and tried before a consular "court" in Japan under a statute authorizing American consuls to try American citizens charged with committing crimes in Japan and certain other "non-Christian" countries. Justice Black stated that this case is one of those which cannot be understood except in its peculiar setting, that it was doubtful if a similar result would be reached today and that "at best the *Ross* case should be left as a relic from a different era." Reid v. Covert, *supra* note 6, at 12.

<sup>10</sup> Balzac v. Puerto Rico, 258 U.S. 298 (1922); Dorr v. United States, *supra* note 7; Hawaii v. Mankichi, 190 U.S. 197 (1903); Downes v. Bidwell, 182 U.S. 244 (1901). These cases involved territories which had recently been conquered or acquired by the United States and which had entirely different cultures and customs from those of this country. It would have been inexpedient to require jury trial after indictment by grand jury in these possessions. "None of these cases had anything to do with military trials and they cannot properly be used as vehicles to support an extension of military jurisdiction to civilians." Reid v. Covert, *supra* note 6, at 14.

hearing of *Reid v. Covert*, had been the basis for the holding that an American citizen outside the United States is not entitled, as a matter of constitutional right, to trial before an article III court for an offense committed abroad.<sup>11</sup>

### *Relation to the Land and Naval Forces*

The more difficult constitutional issue is whether civilian employees and/or dependents accompanying the armed forces overseas, fall within the scope of Congress' power "To make Rules for the Government and Regulation of the land and naval Forces."<sup>12</sup> It has been held that this clause creates an exception to the normal constitutional requirement of trial in civil courts and permits Congress to authorize military trial of members of the armed forces without according all the safeguards given an accused by article III and the Bill of Rights.<sup>13</sup> A finding that the civilians in question are a part of the armed forces for this purpose would therefore render them amenable to court martial jurisdiction in spite of the extraterritorial reach of constitutional guarantees.

### *(a) Dependents*

The argument in favor of including dependents within the scope of Congress' power to regulate the armed forces is based upon an application of the necessary and proper clause to the article I grant. The contention is that from a morale standpoint, there is a pressing need for dependents to accompany American forces abroad; that such dependents affect the military community as a whole; that their status as an integral part of the military community requires disciplinary control over them by the military commander; that the effectiveness of this control depends upon a readily available machinery affording a prompt sanction and resulting deterrent available only through court martial jurisdiction; and that court martial jurisdiction is not only inherently fair, but there are no alternatives to it.<sup>14</sup> These considerations, it is said, make it necessary and proper for Congress to include dependents within the scope of court martial jurisdiction in exercising its power to regulate the armed forces.

The Court rejected this argument in the landmark decision of *Reid v. Covert*,<sup>15</sup> a case involving a serviceman's wife charged with

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<sup>11</sup> See *Reid v. Covert*, 351 U.S. 487 (1956).

<sup>12</sup> U.S. Const. art. I, § 8, cl. 14.

<sup>13</sup> *Ex parte Reed*, 100 U.S. 13 (1879); *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857).

<sup>14</sup> Supplemental Brief for Appellant and Petitioner on Rehearing, *Reid v. Covert*, *supra* note 6, at 49.

<sup>15</sup> 354 U.S. 1 (1957).

the murder of her husband on an Air Force base in England. Four justices were of the opinion that Congress' power to prescribe rules for the government of the armed forces is limited to the class described, namely, "the land and naval Forces," and that the necessary and proper clause may not be used to extend military jurisdiction to any group beyond that class, no matter what the necessity because of the overriding importance of the protections afforded by the article III courts. "Having run up against the steadfast bulwark of the Bill of Rights, the Necessary and Proper Clause cannot extend the scope of Clause 14."<sup>16</sup> Justices Harlan and Frankfurter concurred in the result on the narrow ground that article 2 (11) could not be applied to a dependent charged with a *capital offense*, where the "awesome finality" of the death penalty required the balance of conflicting interests to be resolved in favor of the accused.<sup>17</sup>

The opinion of the Court in *Covert* suggested that the test for court martial jurisdiction is one of *status* and that dependents as a class do not fall within the scope of Congress' power to regulate the armed forces. However, this was not a majority opinion, and the case decided only that dependents charged with capital offenses are not subject to court martial jurisdiction. The question remained whether the Court would adopt this test in cases involving non-capital offenses or whether it would find the balance in favor of the government in such cases, where the importance of maintaining military discipline is equally present, but where the irrevocable conclusiveness of the death penalty is no longer a factor.

*Kinsella v. Singleton*<sup>18</sup> provided the answer. The majority opinion, adopting the status test, held that no constitutional distinction can be drawn between capital and non-capital offenses and that continued adherence to *Covert* required a holding that dependents may not be tried by military tribunal no matter what the nature of the offense. In refusing to make a "fresh evaluation and a new balancing" for non-capital cases, the Court said:

If civilian dependents are included in the term "land and naval Forces" at all, they are subject to the full power granted the Congress therein to create capital as well as non-capital offenses. This Court cannot diminish and expand that power, either on a case-by-case basis or on a balancing of the power there granted Congress against the safeguards of Article III and the Fifth and Sixth Amendments.<sup>19</sup>

If the "status" premise is sound, the result in *Singleton* was

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<sup>16</sup> *Id.* at 21.

<sup>17</sup> *Id.* at 41-64, 65-78.

<sup>18</sup> 361 U.S. 234 (1960).

<sup>19</sup> *Id.* at 246.

clearly dictated by the *Covert* decision, since that case would have the effect of excluding dependents *as a class* from the scope of Congress' power under the article I grant. If it is not sound, then the argument that considerations of morale and military discipline make it necessary that court martial jurisdiction extend to civilian dependents in non-capital cases, a judgment which Congress has manifested by enacting article 2 (11), has considerable validity. The express power to govern and regulate the armed forces, when read in connection with the necessary and proper clause, could be taken as *including* the power to govern civilians accompanying those forces overseas; and the only effect of the *Covert* decision would be to say that trial of such persons by court martial in capital cases is *not an appropriate exercise* of that power.<sup>20</sup>

The majority's restrained view of the effect of the necessary and proper clause on Congress' power to regulate the armed forces contrasts sharply with the Court's use of that clause in defining the constitutional limits of federal power under the commerce clause. It has been held, for example, that Congress has the power to regulate an individual's production of wheat not intended in any part for commerce but wholly for consumption on the farm because such local activity, if unregulated, might exert a substantial, adverse economic effect on interstate commerce.<sup>21</sup> In other words, in exercising its

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<sup>20</sup> In adopting the "status" test in the *Singleton* case, seven members of the Court concurred in the view that the necessary and proper clause is "not itself a grant of power, but a caveat that the Congress possesses all of the means necessary to carry out the specifically granted 'foregoing' powers of § 8, *Kinsella v. Singleton*, . . ." *supra* note 18, at 247. See also, concurrence of Justices Whittaker and Stewart on this point, *Kinsella v. Singleton*, *supra* note 18, at 263. Accordingly, if Congress was not granted the power to prescribe military trial for dependents in clause 14, it does not have it. The Court relied heavily on *United States ex rel. Toth v. Quarles*, *supra* note 8, a case involving a discharged soldier who was tried by court martial after his discharge from the Army, for an offense committed before his discharge. In that case the Court invoked the doctrine calling for "the least possible power adequate to the end proposed" and held that the *ex-serviceman* could not be tried by court martial. Justices Harlan and Frankfurter took a different view of the effect of the necessary and proper clause. Citing Mr. Justice Brandeis in *Ruppert v. Caffey*, 251 U.S. 264, 300-301 (1920), they argued that the necessary and proper clause is an express power of Congress. "The Necessary and Proper Clause cannot be used to 'expand' powers which are otherwise constitutionally limited, but that is only to say that when an asserted power is not appropriate to the exercise of an express power, to which all 'necessary and proper' powers must relate, the asserted power is not a 'proper' one." *Kinsella v. Singleton*, *supra* note 18, at 254-55. Therefore, although it is "improper" for the Congress to prescribe trial of dependents overseas by court martial in capital cases, it may still be "proper" to prescribe such trial in non-capital cases in order to carry out effectively its power to regulate the armed forces.

<sup>21</sup> *Wickard v. Filburn*, 317 U.S. 111 (1942).

power "To regulate Commerce . . . among the several States. . . ,"<sup>22</sup> Congress has the power to regulate *intrastate* activities having a substantial effect on the interstate activity which is the principal subject of regulation.<sup>23</sup> By analogy it can be argued that Congress has the power to govern by reasonable means those non-members of the armed forces whose presence in the military community affects the accomplishment of the military mission. The failure of the Court to draw this analogy reflects a higher regard for civil liberty than for economic liberty.

(b) *Civilian Employees*

The rationale utilized by the Court in deciding whether military jurisdiction could be extended constitutionally to cover civilian employees is consistent with the *Covert* and *Singleton* cases, but perhaps somewhat less tenable. In *Grisham v. Hagan*,<sup>24</sup> a case involving a capital offense, the majority held that a civilian employee charged with a capital crime must have the benefit of a jury and therefore may not be tried by military court martial. The Court could see no distinction between dependents and employees sufficient to take the latter out of the rule of the *Covert* case. As for military jurisdiction over lesser offenses committed by employees, the "status" test of *Kinsella v. Singleton* required a holding of no jurisdiction.<sup>25</sup>

It may be questioned whether in so holding the Court took sufficient notice of the distinction which can be drawn between dependents and employees and whether the latter may not be considered a "part of" the armed forces so as to bring them directly within the scope of Congress' power under article I, section 8, clause 14. Their relationship to the military establishment was described by Justice Whittaker in the following terms:

[Civilian employees], numbering more than 25,000 employed at United States bases located in 63 countries throughout the world—mainly highly trained specialists and technicians possessing skills not readily available to the armed forces—are engaged in purely military work . . . These civilian employees thus perform essential services for the military and, in doing so, are subject to the orders, direction and control of the same military command as the "members" of those forces; and, not infrequently, members of those forces who are assigned to work with and assist those employees are subject to their direction and control. They have the same contact with, and information concerning, the military operations

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<sup>22</sup> U.S. Const. art. I, § 8, cl. 3.

<sup>23</sup> See also *The Shreveport Case*, 234 U.S. 342 (1914) (power of I.C.C. to order increase in intrastate railroad rates where latter are causing discrimination against interstate commerce).

<sup>24</sup> 361 U.S. 278 (1960).

<sup>25</sup> *McElroy v. Guagliardo*, 361 U.S. 281 (1960).

as members of those forces and present the same security risks and disciplinary problems. They are paid upon the same payroll, and have the same commissary, housing, medical, dental, mailing, transportation, banking, tax exemption, customs benefits, border crossing privileges, and other privileges as members of the armed forces. They are so intertwined with those forces and military communities as to be, in every practical sense, an integral part of them.<sup>26</sup>

By contrast, dependents perform no direct services for the armed forces and thus stand in different relationship thereto. Mr. Justice Whittaker argued that the historical materials show that the framers of the Constitution were aware of the necessity of court martial jurisdiction over civilians serving with the armed forces,<sup>27</sup> that the Articles of War provided for such jurisdiction from the beginning,<sup>28</sup> and that the Court has consistently held in various contexts that clause 14 does not limit the power of Congress to the government and regulation of only those persons who are "members" of the armed forces.<sup>29</sup>

The above factors would seem to provide ample ground for distinguishing *Covert* and *Singleton* and holding civilian employees subject to court martial jurisdiction. The fact that the Court chose not to do so indicates that there are basic policy considerations militating against any extension of the jurisdiction of the military courts.

### *Policy Considerations*

Perhaps the most fundamental policy underlying these decisions is the long standing notion that military power should be subordinate to civilian authority. Declared Mr. Justice Black in *Reid v. Covert*:

We should not break faith with this nation's tradition of keeping military power subservient to civilian authority, a tradition which we believe is firmly embedded in the Constitution . . . [U]nder our Constitution courts of law alone are given power to try civilians for their offenses against the United States.<sup>30</sup>

Any recognition of court martial jurisdiction over civilians operates in contravention of this policy.

Second, and perhaps equally influential, is the fear on the part of the Court that military courts are subject to uncontrollable abuse which in any given case might result in injustice to the accused.

. . . [T]he business of soldiers is to fight and prepare to fight wars, not to try civilians for their alleged crimes . . . [T]here has

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<sup>26</sup> *Kinsella v. Singleton*, *supra* note 18, at 264-65.

<sup>27</sup> *Id.* at 266-69.

<sup>28</sup> *Id.* at 269-71.

<sup>29</sup> *Id.* at 271-72. It should be noted that the majority arrived at conflicting conclusions from its review of the historical materials, *id.* at 235-249.

<sup>30</sup> *Reid v. Covert*, *supra* note 15, at 40.

always been less emphasis in the military on protecting the rights of the individual than in civilian society and in civilian courts.<sup>31</sup>

The additional facts that military tribunals are *ad hoc* bodies subject to varying degrees of command influence, that military law is frequently cast in sweeping and vague terms, and that it is subject to amendment in certain instances by the President, without the aid of the Congress,<sup>32</sup> contribute to the Court's basic distrust of the military tribunal as a guarantor of constitutional rights.

Thus, in expressing its reluctance to extend the scope of article I, section 8, clause 14, of the Constitution any further than absolutely necessary, the Court has drawn the line at the point where a person ceases to be an actual member of one of the branches of the armed forces. All others are outside the scope of the Uniform Code of Military Justice and may not be tried by court martial. Assuming that some form of control over civilians employed by and accompanying the armed forces overseas is necessary in order to carry out effectively the military mission, what practical alternatives are now available to Congress to provide such control? This is the question to be considered in the pages which follow.

#### ALTERNATIVES

The writer is unaware of any efforts by Congress since the *Covert* decision was announced in 1957 to provide for the exercise of federal criminal jurisdiction over dependents and civilian employees for crimes committed overseas. In the United States these persons are subject to the general criminal laws of the state and federal governments and are tried in the state and federal constitutional courts.<sup>33</sup> However, while overseas with the armed forces they are beyond the reach of American law since the Uniform Code of Military Justice, the sole body of federal law purporting to govern their conduct, has been, as to them, declared unconstitutional. One reason for Congress' delay in enacting remedial legislation has been to await the decision by the Supreme Court of cases testing the scope of the *Covert* doctrine. Now that those cases have been decided, it is time to consider what form such legislation, if any, should take. No attempt will be made in the limited space here available to detail a legislative scheme to meet the problem. The attempt will be merely to suggest several possible solutions and to discuss some of the legal and practical difficulties inherent in each.

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<sup>31</sup> *Id.* at 35-36.

<sup>32</sup> *Id.* at 36-39.

<sup>33</sup> For a discussion of procedure for trying civilian dependents and employees for crimes committed in the United States, see Reply Brief for Appellant and Petitioner on Rehearing, *Reid v. Covert*, *supra* note 15, at 71-73.



There are at least two important qualifications which any proposed legislation must meet in order to be acceptable. First, it must provide a system of courts affording the accused all the constitutional protections available to a defendant in an article III court sitting in the United States. This is the mandate of the *Covert* doctrine. Second, it must be acceptable to each of the 63 nations in which our armed forces are stationed. Although Congress undoubtedly has the power to prescribe which acts committed by civilians accompanying the armed forces abroad shall be criminal,<sup>34</sup> it does not have the power to provide for the trial of offenders in a foreign country without the consent of that country.<sup>35</sup> Trial in the United States could, of course, be authorized without the acquiescence of the country in which the offense was committed; but, as a practical matter, where the receiving state had custody of a civilian employee or dependent charged with a violation of its law, the consent of that country would be necessary before the United States could obtain custody of the accused. Therefore, any new arrangements regarding federal criminal jurisdiction over these persons will depend for their ultimate validity upon successful renegotiation of our agreements with the host states.

Presumably a criminal code applicable to civilian dependents and employees would be quite similar in its substantive provisions to the Uniform Code of Military Justice since Congress has already indicated in that enactment what standards of conduct it will require of them. Proceeding on this assumption, it is clear that the new code would prescribe two broad categories of crimes: (1) those which would also be violations of the law of the receiving state, e.g., murder, rape, larceny, assault and battery; and (2) those which would be punishable only under the law of the United States, e.g., breach of security regulations, violations of health, welfare and disciplinary regulations relating solely to the conduct of military affairs. The principal inquiry is whether an existing system of courts can be utilized in the enforcement of such legislation or whether new courts must be provided.

### *Trial by District Courts in the United States*

The most obvious system of courts to use for the trial of these civilians would be the federal district courts sitting in the United States. Such a procedure would be in conformity with the current practice of trying, in the district into which the offender is first

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<sup>34</sup> *Blackmer v. United States*, 284 U.S. 421 (1932); *United States v. Bowman*, 260 U.S. 94 (1922). See also, 1 Hyde, *International Law* 798-800 (1945).

<sup>35</sup> On the general subject of extraterritorial jurisdiction see 2 Hyde, *International Law* 849-871 (1945).

brought, federal offenses committed outside the jurisdiction of any state or district.<sup>36</sup> However, the problems encountered in applying this system to civilians accompanying our armed forces in foreign lands for crimes committed in those lands are formidable.

First there is the problem of obtaining the consent of the receiving state. For crimes which would be violations of the law of both the sending and receiving states, it is doubtful whether any nation would consent to the removal of the accused from its territory for trial. This conclusion is substantiated by a review of the NATO Status of Forces Agreement.<sup>37</sup> That agreement was predicated upon the assumption that United States military jurisdiction extended not only to the military contingent but also to members of the civilian component and to dependents accompanying those forces overseas. For offenses involving violations of the law of both the sending and receiving states, the military authorities of the sending state were given primary jurisdiction over members of the civilian component only in relation to (1) *inter se* offenses and (2) offenses arising out of an act done in the performance of official duty;<sup>38</sup> and such jurisdiction was to be exercised *within the receiving state*.<sup>39</sup> In all other situations involving the civilian component, it was to be the primary right of the receiving state to try the accused.<sup>40</sup> As for civilian dependents, "... the drafters of the Agreement envisaged the power of the receiving State . . . not merely as a primary right to exercise concurrent jurisdiction, but rather as exclusive jurisdiction when the act in question was an offense against the law of that State,"<sup>41</sup> although in practice this distinction between civilian employees and dependents seems never to have been recognized or given effect.<sup>42</sup> In view of the interest of receiving states in maintaining their supremacy as territorial sovereigns by punishing violations of their own law, or at least by having evidence thereof close at hand,<sup>43</sup> it is doubtful that in any renegotiation of these agreements they would permit the removal of civilian dependents and employees to the United States for trial of this class of crimes. No such objections would likely be raised to removal where no violation of local law was involved.

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<sup>36</sup> 18 U.S.C. § 3237 (1948).

<sup>37</sup> T.I.A.S. 2846.

<sup>38</sup> N.A.T.O. S.O.F., art. VII, par. 3 (a) (i), (ii).

<sup>39</sup> *Id.*, par. 1(a).

<sup>40</sup> *Id.*, par. 3(b).

<sup>41</sup> Snee & Pye, Status of Forces Agreement: Criminal Jurisdiction 35 (1957).

<sup>42</sup> *Id.*, at 39. The authors state that they have seen no case in which foreign authorities claimed or American authorities admitted any distinction in this regard between dependents and members of the civilian component, the former being considered by both parties as subject to the concurrent jurisdiction of the sending State.

<sup>43</sup> 1 Hyde, International Law 815 (1922).

Assuming that the problem of obtaining the consent of the receiving states can be overcome, there remain other serious objections to trial in the United States. Compulsory process is essential to any system of justice; but the attendance of foreign nationals as witnesses in trials in this country would necessarily be on a voluntary basis since, as a matter of international law, such attendance could never be compelled.<sup>44</sup> Therefore, many prosecutions would fail because of the government's inability to produce unwilling witnesses whose presence would be necessary to accord the accused his constitutional right to confrontation. And even if the government could produce its witnesses, the accused would frequently be deprived of the right to call witnesses on his own behalf because of the lack of compulsory process. Also weighing heavily on the accused's ability to present an adequate defense would be the expense involved in defending a case far from the scene of the crime. It takes little imagination to envision the costs which would be incurred in gathering evidence in a foreign country and in transporting witnesses to this country for the trial. Furthermore, the delay which would inevitably exist between the time of the commission of the crime and the time of the trial would substantially decrease the deterrent value of the prosecution, particularly as regards the violation of health, welfare and disciplinary regulations, where the punishment, to be effective, must be speedy and local.<sup>45</sup> It is to be expected, therefore, that only the most serious offenses would be brought to the United States for trial. Hundreds of petty cases would go unprosecuted. In the words of Justice Clark: "In short, this solution could only result in the practical abdication of American judicial authority over most of the offenses committed by American civilians in foreign countries."<sup>46</sup>

In view of the above considerations, it would seem that trial of these persons by article III courts sitting in the United States, if possible at all, would be unworkable as a general solution to the problem.

#### *Trial by Article III Courts in Receiving States*

A second solution which has been suggested is the establishment of article III courts in the nations in which our troops are stationed. Bringing the courts to the accused would overcome many of the difficulties connected with trial in the United States, but the establishment of such courts presents a host of problems of its own.

There is again the problem of obtaining the consent of the re-

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<sup>44</sup> *Id.* at 732-33.

<sup>45</sup> Supplemental Brief for Appellant and Petitioner on Rehearing, *Reid v. Covert*, *supra* note 15, at 34-35.

<sup>46</sup> *Reid v. Covert*, *supra* note 15, at 85 (dissenting opinion).

ceiving states. Indeed, the United States might well hesitate to ask it. Commenting on this possibility in the *Covert* case, the government counsel said:

The United States would be reluctant to ask countries to agree, as one of the consequences of stationing United States troops within their territory, that they allow the United States to establish a system of civilian courts to sit in their country and to try American civilians who accompany the armed forces for conduct for which they could also be tried in the local courts. Any such request could not avoid the implication that a fair trial would not be available in the courts of the receiving state.<sup>47</sup>

Furthermore, after the *Covert* decision the United States might have difficulty in justifying a claim for such a jurisdiction. Addressing themselves to this issue Father Snee and Professor Pye had this to say:

... [T]he suggestion that dependents be tried by American civilian courts for crimes committed in other NATO countries overlooks the fact that the sole ground for a claim of jurisdiction by the sending State over its dependents is their ultimate relationship to the armed force or civilian component of whose members they are dependents. If that relationship is so tenuous or non-existent that it will not afford constitutional sanction for the exercise of jurisdiction by a military court, there would seem to be no basis for the sending State to claim, nor for the receiving State to grant, the right to exercise criminal jurisdiction over dependents for conduct which also constitutes an offense against the law of the receiving State, any more than in the case of ordinary tourists.<sup>48</sup>

Supposing for the moment that the consent of the receiving states could be obtained, there are nevertheless a number of other difficulties inherent in this system. It would be manifestly impossible to set up courts in each of the 63 countries in which American troops are stationed. Not only would the cost be prohibitive, but it would also be extremely difficult to staff such a great number of courts with judges, clerks and other administrative personnel. Perhaps the number of courts required could be cut down by establishing districts, with each district court having jurisdiction over crimes committed in certain specified countries and either sitting permanently in one location or sitting periodically in each country within its district. But from what source would the jurors be drawn? A jury made up of military personnel would be tantamount to a court martial and subject to the same danger of command influence. Juries drawn from the civilian contingent would be subject to the same objection. The impracticability of selecting jurors from among American tourists

<sup>47</sup> Supplemental Brief for Appellant and Petitioner on Rehearing, *Reid v. Covert*, *supra* note 15, at 51.

<sup>48</sup> Snee & Pye, *supra* note 41, at 44.

travelling in foreign lands is obvious. The only remaining possibility would be to use juries drawn from the local populace. However, such jurors could not be compelled to attend the trial, and there would be the additional problem in most countries of language differences. Furthermore, in non-common law countries, the jury system would be completely unfamiliar to the local citizenry and "would be tossed about like a cork on unsettled waters."<sup>49</sup> Also not to be ignored are the problems of compelling attendance of unwilling foreign witnesses, punishing for contempt and providing sanctions for perjury.

In short, the alternative of establishing article III courts to try offenders in foreign lands would at best be cumbersome and expensive and in all probability would be rejected if proposed.

### *Special Solution for Civilian Employees*

The number of civilian employees with the armed forces is small in comparison with the number of dependents; and the intimate relationship of this group to the military establishment makes it convenient for the United States to have local control over it.<sup>50</sup> Obviously concerned about the effect of its decision on the control formerly believed to exist over this group under the Uniform Code of Military Justice, the Supreme Court in *McElroy v. Guagliardo*<sup>51</sup> made the following suggestion as to possible alternative solutions:

One solution might possibly be to follow a procedure along the line provided for paymasters' clerks as approved in *Ex parte Reed*.<sup>52</sup> Another would incorporate those civilian employees who are stationed outside of the United States directly into the armed services, either by compulsory induction or by voluntary enlistment. If a doctor or dentist may be "drafted" into the armed services, . . . there should be no legal objection to the organization and recruitment of other civilian specialists needed by the armed services.

Moreover, the armed services presently have sufficient authority to set up a system for the voluntary enlistment of "specialists" . . . It likewise appears entirely possible that the present "specialist" program conducted by the Department of the Army could be utilized to replace civilian employees if disciplinary problems required military control . . . The increased cost to maintain these

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<sup>49</sup> *Reid v. Covert*, *supra* note 15, at 88 (dissenting opinion of Clark J.).

<sup>50</sup> At the time of the *Covert* case (1957) there were more than 450,000 American civilians overseas with the armed forces. Of these, about 415,000 were dependents and 38,000 were direct government employees and contractor employees. Reply Brief for Appellant and Petitioner on Rehearing, *Reid v. Covert*, *supra* note 15, at 62.

<sup>51</sup> *Supra* note 25, at 286-87.

<sup>52</sup> *Supra* note 13. This case permitted the trial by court martial of a paymaster's clerk in the Navy. He had been required to agree in writing "to submit to the laws and regulations of the government and discipline of the Navy," *id.* at 19, had a fixed rank and was required to wear a uniform.

employees in a military status is the price the Government must pay to comply with constitutional requirements.

Successful implementation of one or more of these suggested solutions would solve the problem as to civilian employees. Bringing this group *into* the military contingent would automatically bring them under the provisions of the Uniform Code of Military Justice without necessitating the slightest amendment of existing treaties.<sup>53</sup> Of course, it is a matter of conjecture whether all civilian positions overseas could be "militarized." Many of these slots were formerly occupied by military personnel and were converted to civilian positions as part of "Operation Teammate," a scheme designed to cut the cost of our overseas operations.<sup>54</sup> There would be no problem in reconverting these positions. However, it is doubtful that full scale replacement with military personnel could ever be completely accomplished and eliminate the need for any civilian employees overseas. There are, for example, a number of highly skilled contractor employees and technical representatives whose positions presumably could not be converted.<sup>55</sup> As to these persons a different solution

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<sup>53</sup> When an armed force is in a country in pursuance of an agreement between Governments, the terms of the agreement govern all questions of jurisdiction which are the subject matter of the agreement. 1 Hyde, *International Law* 819-20 (1945). In the absence of express agreement, it is a rule of international law that the consent to the presence of foreign troops implies a waiver by the receiving State of at least a portion of its local jurisdiction. *The Schooner Exchange v. M'Faddon*, 11 U.S. 116, 139 (1812); Oppenheim, *International Law* par. 445 (1928). But it has recently been held that this rule only applies to persons who are *actual members of the military force*. *Chow Hung Ching v. The King*, 77 C.L.R. 449 (1948). In that case a group of Chinese nationals were in the Territory of New Guinea to collect surplus war supplies sold to China by the United States. These persons were subject to Chinese military law and wore uniforms, but were not actually soldiers. Two laborers from this group were tried in a local court for having assaulted a native of the island and were convicted. On appeal, the High Court of Australia held that the accused were not "members" of a military force and, therefore, had no immunity from the jurisdiction of local courts as might have been possessed by a member of such force. It is questionable, therefore, whether the *Ex parte* Reed solution suggested by Justice Clark (*Supra* note 13) would make a person enough a "member" of our armed forces to bring him within the terms of the treaty.

<sup>54</sup> In 1956 the Army undertook the process of substituting 11,888 civilians for 12,495 military persons under the title "Operation Teammate." See Dept. of the Army Appropriations for 1956, Hearings before the Subcommittee of the House Committee on Appropriations, 84th Cong., 1st Sess., pp. 4, 74, 296-97, 459-63, 1124-26. See also official comment on Operation Teammate (Army Information Digest Vol. 10, No. 4 (Apr. 1955), p. 47.

<sup>55</sup> Reply Brief for Appellant and Petitioner on Rehearing, *Reid v. Covert*, *supra* note 15, at 63. At that time there were with our armed forces overseas 1635 technical representatives and 4500 contractor employees which the Government described as "highly skilled technicians and advisors whose services are indispensable to a military

would have to be worked out. Perhaps this small group could be handled in the same manner as our foreign service employees. The latter comprise a small group of highly selected personnel among whom order and discipline is maintained by means of the deterrent effect of reprimand, suspension without pay and dismissal.<sup>56</sup> For more serious crimes they are tried by the courts of the country in which the offense is committed. It is quite possible that the same system could be applied to the small number of highly skilled civilian employees of the armed forces who cannot be replaced directly with military personnel.

### *The Probable Solution for Dependents*

It has been seen that the legal and practical problems inherent in the establishment of article III courts to try civilian dependents and employees either in the United States or in the receiving states are so formidable as to make either method impracticable as a general solution to the problem. Dependents make up roughly 90% of the American civilians overseas.<sup>57</sup> It is probably fair to say that this group does not occupy as close a relation to the military establishment as do civilian employees since they are not directly engaged in the accomplishment of the military mission. A course which Congress might reasonably follow in dealing with this group would be to leave them in the same position as American tourists—subject to the criminal jurisdiction of the receiving states for all crimes constituting violations of the laws of those states. It may be objected that, depending upon the country involved, its courts may fail to accord an accused certain rights which the United States considers essential to a fair trial (e.g., the right to confrontation, the privilege against self-incrimination, the right to an impartial jury, etc.). Further trial in a foreign court places an accused in a court where he is unfamiliar with the forms of procedure and where, in many cases, he will be tried in a foreign language. A possible answer would be for the United States to secure by treaty as many protections for its service dependents as the foreign nations will accord. Under the NATO Status of Forces Agreement, receiving and sending states are pledged, among other things, to assist each other in obtaining evidence and witnesses, to accord the right of confrontation and to allow the accused to have legal representation of his own choice.<sup>58</sup> These

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force which must increasingly rely on ever-changing and ever-more complicated scientific equipment."

<sup>56</sup> Reply Brief for Appellant and Petitioner on Rehearing, *Reid v. Covert*, *supra* note 15, at 73-74.

<sup>57</sup> *Ex parte Reed*, *supra* note 13.

<sup>58</sup> T.I.A.S. 2846. Section 9 of the Agreement read as follows: "Whenever a member

provisions continue to apply even though dependents are beyond the reach of military jurisdiction. Further, the United States could assist the accused in securing competent foreign counsel or provide counsel itself. As for those offenses which are not violations of foreign law, it is believed that the threat of being sent back to the United States would tend to influence dependents to comply with local base regulations. And the threat of having to maintain separately those dependents in the United States would encourage their servicemen-husbands and fathers to exercise considerable discipline of their own.

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of a force or civilian component or a dependent is prosecuted under the jurisdiction of a receiving State he shall be entitled (a) to a prompt and speedy trial; (b) to be informed, in advance of trial, of the specific charge or charges made against him; (c) to be confronted with the witnesses against him; (d) to have compulsory process for obtaining witnesses in his favor, if they are within the jurisdiction of the receiving State; (e) to have legal representation of his own choice for his defense or to have free or assisted legal representation under the conditions prevailing for the time being in the receiving State; (f) if he considers it necessary, to have the services of a competent interpreter; and (g) to communicate with a representative of the Government of the sending State and, when the rules of the court permit, to have such a representative present at his trial."